A **CELVAMBIGAI S THIRUCELVAM v. PANDIAN SUBRAMANIAM**

HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG J
[DIVORCE PETITION NO: 33-1037-05-2013]
24 APRIL 2015

B

CIVIL PROCEDURE: *Judgments and Orders – Interim Orders – Nature and effect, of – Whether court may depart from terms of interim order during subsequent divorce proceedings*

C ***EVIDENCE:*** *Judicial notice – Judicial notice of facts – Whether judge may take judicial notice of fact of high costs of living in Klang Valley*

FAMILY LAW*: Children – Access – Principles to consider – Need to spend quality time with both parents – Undesirability of splitting children – Consideration of children's schooling needs*

D ***FAMILY LAW:*** *Children – Custody – Interim order – Interim relief for custody of children obtained by consent order – Whether court may depart from terms of consent order during subsequent divorce proceedings*

FAMILY LAW: *Divorce – Petition – Maintenance – Children – Duty to maintain* E *– Respective duties of husband and wife – Whether husband's potential earning capacity to be taken into account – Law Reform (Marriage and Divorce) Act 1976, ss. 92, 93*

FAMILY LAW: *Divorce – Petition – Maintenance – Children – Proof, of –* F *Whether wife proved needs and expenses of children – Detailed breakdown of expenses of children given – Whether supporting documents required for each and every item – Whether judge may follow investigative approach in determining maintenance for children*

FAMILY LAW: *Divorce – Petition – Maintenance – Children – Right to apply* G *– Interim relief by consent order only given pertaining custody of children – Whether wife prevented from praying for maintenance for children during subsequent divorce proceedings*

The petitioner wife and the respondent husband were married on 5 September 2002. The petitioner was an accountant. The respondent was 37 years old and had a degree in Bachelor of Engineering. They had three H children of ages eight, seven and five. The matrimonial problems came to a head in 2010 when the petitioner claimed she was forced out of the matrimonial home by the respondent. The petitioner then lived in her father's house with the children. The relationship deteriorated further and the petitioner filed an originating summons in OS 24-1990-2011 in the High I Court ('OS') seeking interim reliefs before the filing of a divorce petition. A consent order ('the consent order') was entered into wherein the parties

agreed that the petitioner shall have care, control and custody of the three children with the respondent being given access on Saturday from 4pm to Sunday 6pm. The eldest son was five years old then; the second son four years old; and the third child, a daughter, two years plus. The petitioner then filed the present divorce petition seeking, *inter alia*: (i) that the marriage be dissolved; (ii) that care, control and custody of the three children be given to her; (iii) that the respondent be given access to the children on alternate Saturday from 2pm to 6pm; and (iv) that the respondent pay RM1,500 per month as maintenance for the three children. The respondent contended that the present court had no *locus* or power to vary the consent order and that as the prayer for maintenance of the children had not been applied for in the OS, the petitioner could not pray for it in the present divorce petition. The respondent further contended that the petitioner had not proved on the balance of probabilities the needs of the children with respect to the expenses of the children. He claimed that there were no documents shown to support the petitioner's claim for maintenance of RM500 per month for each of the three children.

Held (allowing petitioner's claims):

(1) The OS was, by its very nature, an interim application yielding an interim order until the divorce petition was filed. Any order for custody, access and maintenance would by its very nature be an interim order of a temporary nature until the court hears the divorce petition and the ancillary reliefs of custody, access and maintenance fully considered. A consent order pursuant to an OS filed before a divorce petition is filed, is by its very nature interim and temporary only until the divorce petition is heard. The court will look at the application for custody, access and maintenance afresh in a divorce proceeding and may vary, affirm or rescind it, bearing in mind always what had been ordered or agreed by consent and having always in the forefront of its mind the reasonableness of the desires of the parties and the welfare of the child. (paras 14, 15 & 24)

(2) There were no merits whatsoever in the respondent's submission that as there was no consent order recorded on maintenance for the children, the petitioner could not claim for maintenance for the children in the divorce petition. (para 27)

(3) The petitioner had given a detailed breakdown of the expenses of the children for 2013. There was no good reason to doubt these expenses though she might not have a complete dossier of supporting documents for each and every item. However, most of the items were supported with receipts. (para 34)

(4) A judge is perfectly entitled to take judicial cognisance if not judicial notice of the fact of the high costs of living in the Klang Valley and what not with the then impending implementation of the goods and services tax (GST) and to draw on his personal experience of bringing up children and the experience that costs of education, food, clothing, utilities and transport have all been on the rise. A judge hearing a divorce petition where oral evidence is given in support of the wife's claim for maintenance of the children is entitled to follow an investigative approach in determining what is a reasonable maintenance for the children. (para 36)

(5) The duty of a parent to maintain his or her children is statutorily provided for in s. 92 of the Law Reform (Marriage and Divorce) Act 1976 ('LRA'). The husband has a primary duty to maintain his children as contained in s. 93 LRA. The wife's duty to maintain her children is only secondary; supportive and supplementary to that of the husband as can be seen in s. 93(2) LRA. (paras 43-45)

(6) Having graduated at 23 years old with a degree in Electronic Design System, and now at 37 years old, the respondent's take home pay was dismally disproportionate to his qualification and years of experience. He painted a pathetic picture of an average monthly expenses of RM1,800 per month. The respondent as a primary provider for the children ought to be more resourceful and enterprising. His earning capacity and potential has to be taken into account in determining his contribution towards maintaining the children. It is not uncommon for many working in the Klang Valley to take on another part time job to supplement the income from one's full time job especially for a husband with growing children and correspondingly growing financial needs. (paras 48, 50 & 51)

(7) Taking into consideration, the petitioner's higher income, the growing needs of the children and the current and potential earning capacity of the respondent, a sum of RM1,000 per month for maintenance for the three growing children was acceptable. (para 55)

(8) Children must be allowed to spend quality time with both the parents. The court would also consider the undesirability of splitting the children where overnight access is concerned. The court took into consideration the fact that the children were quite tired after the overnight weekends with the respondent leaving them less than prepared for the challenges of the week ahead starting Monday. As the petitioner was also working for long hours, there was also the need for her to have some time relaxing with the children on weekends. The respondent also needed some of the weekends for extra work so that he may be in a better position to provide for the children. Hence, the respondent's access to the children was reduced to every alternate Saturday from 3pm to 8pm and on every Sunday from 9am to 5pm. (paras 59-62)

Case(s) referred to:
Chung Fui Chu v. Foo Ho Cheng & Another Case [2010] 10 CLJ 93 HC ***(refd)***
Diana Clarice Chan Chiing Hwa v. Tiong Chiong Hoo [2002] 1 CLJ 721 CA ***(refd)***
J v. C [1970] 2 AC 668 ***(refd)***
Lee Yu Lan v. Lim Thain Chye [1983] 1 LNS 41 HC ***(refd)***
Leong Sam Moy v. Low Chee Thiam [1997] 2 CLJ Supp 212 HC ***(refd)***
Mahabir Prasad v. Pushpa Mahabir Prasad [1981] CLJ 124A; [1981] CLJ (Rep) 65 FC ***(refd)***
Prest (Appellant) v. Petrodel Resources Limited And Ors (Respondents) [2013] UKSC 34 ***(refd)***
Rowe v. Rowe [1979] 2 All ER 1123 ***(refd)***
Thompson v. Thompson [1957] 1 All ER 161 ***(refd)***
Wong Ser Wan v. Ng Cheong Ling [2005] SGHC 218 ***(refd)***

Legislation referred to:
Divorce and Matrimonial Proceedings Rules 1980, r. 67
Evidence Act 1950, s. 114(g)
Law Reform (Marriage and Divorce) Act 1976, ss. 2(2), 47, 83, 92, 93(1)(a), (c), (d), (2), 96, 97

For the petitioner - Periasamy Karuppan; M/s Periasamy & Co
For the respondent - Sheelan Arjunan; M/s Sheelan Arjunan & Co

Reported by Amutha Suppayah

JUDGMENT

Lee Swee Seng J:

[1] The petitioner wife was married to the respondent husband on 5 September 2002. She is an accountant having graduated with a degree in accountancy from the University of Western Sydney. She is now 36 years old. She now works as a senior auditor of Viru Goona & Associates. The husband graduated in Electronic Design System from the University of Northumbria Newcastle under a twinning programme with Tafe College in Seremban. His degree was that of a Bachelor of Engineering. He now works as a recovery officer with CCR Networks Sdn Bhd. He is now 37 years old.

Problems

[2] They were blessed with three children named Vasent, Suhganth and Yaalini. Their ages are eight, seven and five respectively. However, cracks began to appear in their marriage. The wife attributed it to the husband's involvement in an affair with another woman. Things came to a head in 2010 when she said she was forced out of the matrimonial home by the husband. She had no choice but to live in her father's house since. She said that though there were much bickering and beatings at home at the hand of the husband, both of them managed to agree on the sale of the matrimonial home and that the proceeds of sale shall be used by them to purchase a house in both their names. However, that did not materialise as the husband, according to the wife, did not want to stay with her.

[3] Parties also agreed on a temporary arrangement with respect to the children in that they were to be taken care by the husband's parents on Monday and Tuesday and by the wife's father on Wednesday to Friday until the parties came home from work. Initially, the arrangement was, working well. Later, more access time was given to the husband from Friday 6pm to Saturday 6pm. The wife was not happy with this overnight stay of the children with the husband as the husband had a habit of not sending the children home on time. There were also times when the husband sent the children home on his motorcycle in the rain.

[4] The wife was concerned about the physical well being of the children when they came home from an overnight stay with the husband. On one occasion, she took the eldest son Vasent for a medical examination and was shocked to find that he had a bump on his head. She suspected that the husband had hit the child for he never loved Vasent very much for standing up for her. She lodged a police report over the incident. When the children were returned in the rain, they were not well after that and she had taken Suhganth to Klinik As-Salinah to see the doctor. The medical bills and receipts were at pp. 40, 41 and 82 of the bundle of documents ("BOD"). The wife said that during this time of separation between 2011 and 2013, she was often verbally and physically abused by the husband. She obtained an interim protection order from the Selayang Magistrate's Court on 27 May 2011 against the husband. The wife also filed an originating summons in the Shah Alam High Court seeking custody, care and control of the children and limiting access of the husband. The order of court of 4 August 2011 is found at pp. 62-63 of the BOD.

[5] She had also lodged various police reports against the husband at pp. 35, 36 and 51 of the BOD for returning the children late, for lodging of false report by the husband, for taking the children without her consent and for trespassing into her family's property and injuring her father in the process. She testified that in the years of separation, the husband had not paid any maintenance for the children.

[6] The respondent husband on the other hand has blamed the wife's disrespect of his family and her cantankerous nature for the breakdown of the marriage. Before their matrimonial home was ready, the wife had stayed with the husband at the house of the husband's father. There was the respondent, his parents and a younger brother and three younger sisters. The respondent was the eldest in his family. The husband alleged that the wife did not like his family members from the beginning and would often denigrate them in the presence of the husband. The wife would often liken the husband to a slave being exploited for the benefit of his family. Slowly but surely according to the husband the simmering discontent and disaffection grew more strident with screaming and shouting by the wife in the skirmishes that would be ignited more regularly. All these in the presence of the husband's parents and siblings, robbing the husband of his respect and dignity. On one

occasion when his father tried to mediate, the husband said the wife's reply was downright rude and disrespectful of his father when she crudely uttered: "mind your own business! Don't be busy body ... this is between me and my husband!" Exhausted and exasperated by what the husband saw as a perennial feature of constant conflict and tension at home, the husband said he acceded to the wife's request to purchase their own house which they eventually moved into in Rawang though this was much further from his place of work. After they move to their own 'space' the husband saw the quarrels at home graduating from her disaffection with his family members to her disdain with him over his alleged affairs with any ladies he is close to. The crunch came when without any prior notice to him, she moved out from the matrimonial home on 23 July 2010 and shifted in with the three children into her father's house in Batu Caves. The husband said he tried to mend the rift by trying to talk to his father-in-law but all his efforts were rebuffed.

[7] Having lived apart for a while from each other, both parties took stock of the situation and entered into a settlement agreement dated 1 April 2011. Though signed on April Fool's Day, in all seriousness they were keen on trying to put aside their differences for the sake of the children. Preamble 5) captures the spirit of the parties in these words:

> (5) without any intent to obtain or stimulate a dissolution of marriage, the parties hereto consider it to be in their best interests and in the best interest and benefit of the children to settle between themselves the differences that have arisen and to reconcile the marriage and wish to withdraw their respective police report with the view to stay under one roof at the said matrimonial home and/or any other place as mutually agreed by both parties.

[8] It was agreed under the agreement that the husband would withdraw all pending proceedings against the wife under Kuala Lumpur High Court Originating Summons No. F24-179-2010. The matrimonial home in Rawang was to be sold and that a sum of RM20,000 from the net proceeds of the sale of the property shall be utilised as down payment for the purchase of a new property under the joint names of the parties and that any surplus after that was to be divided equally. Parties also recognised the need of the children for continuing contact with both parties' family. They had thus agreed that on every Monday and Tuesday, the children will be looked after by the husband's parents and from Wednesday till Friday, the children will be looked after by the wife's father until the parties return from their work.

[9] It was also provided that in the event the parties could not reconcile the issues and differences between themselves in any way howsoever in the future, the parties may terminate the agreement and file a divorce petition to dissolve their marriage.

[10] Alas it was a case where the spirit was willing but the flesh was weak. The relationship deteriorated further and the wife filed an originating summons in OS 24-1990-2011 in the Shah Alam High Court seeking some interim reliefs before the filing of a divorce petition. A consent order was entered into on 4 August 2011. Parties agreed that the wife shall have care, control and custody of the three children with the husband being given access on Saturday from 4pm to Sunday 6pm. The eldest son was five years old then, the second son four years old and the third child, a daughter, two years plus. They had all not begun formal schooling yet.

Prayers

[11] The wife filed this divorce petition in May 2013 seeking the following:

(i) that the marriage be dissolved;

(ii) that care, control and custody of the three children be given to the petitioner wife;

(iii) that the respondent husband be given access to the children on alternate Saturday from 2pm to 6pm;

(iv) that the respondent husband do pay the sum of RM1,500 per month being maintenance for the three children until they reach the age of 18 and that the said sum be paid into the CIMB account of the petitioner as stated on or before the seventh day of each month and the said sum shall be increased by 2% every year;

(v) that the respondent husband do pay the sum of RM1,000 per month being maintenance for the petitioner wife into the said CIMB account by the seventh day of each month and the said sum be increased by 2% every year; and

(vi) costs.

[12] The husband in his answers stated that this court has no locus or power to vary the consent order obtained in the Shah Alam High Court OS on 4 August 2011 and that as the prayer for maintenance of the children had not been applied for in the Shah Alam OS, the petitioner could not pray for it in this divorce petition. As for prayer five and six above the wife was the cause of the breakdown in the marriage and that she had concealed from the husband that her salary is much more than that of the husband.

Preliminaries

[13] Before the trial, parties agreed that the only issue to be tried would be confined to that of additional access to the husband and also maintenance for the children. The husband did not challenge the wife's claim for custody of the children and the wife waived her claim for maintenance for herself. Both parties also accepted the fact that the marriage had broken down irretrievably and that divorce is inevitable.

Principles

Whether The Consent Order In The Previous OS Could Be Varied By This Court

[14] The application of the wife by the OS filed in the Shah Alam High Court was by its very nature an interim application yielding an interim order until the divorce petition is filed. An OS application of this nature is often rife with affidavits of allegations of facts that may be quite diametrically opposite and irreconcilable. Any order for custody, access and maintenance would by its very nature be an interim order of a temporary nature until the court hears the divorce petition to be filed where witnesses are called and the ancillary reliefs of custody, access and maintenance fully considered.

[15] Granted in this case, there was a consent order recorded on 4 August 2011 in the Shah Alam High Court. However, such an order pursuant to an OS filed before a divorce petition is filed, is by its very nature interim and temporary only until the divorce petition is heard. It is of course binding on the parties while it is in force and any breach of it would expose the defaulting party to a contempt action by the aggrieved party. The court hearing the divorce petition and in particular when deciding on the ancillary reliefs of custody, access and maintenance would of course have regard to what the parties had agreed before. That is different from saying that only if there has been misrepresentation, or a mistake as to fact or that there has been a material change of circumstance, then and only then may the interim order be varied, rescinded or substituted. Those considerations would apply to orders made under s. 83 and s. 96 of the Law Reform (Marriage and Divorce) Act 1976 ("LRA") in the case of maintenance for the wife generally and that of custody of and maintenance for children respectively.

[16] Section 83 LRA provides as follows:

> Power for court to vary orders for maintenance
>
> 83. The court may at any time and from time to time vary, or rescind, any subsisting order for maintenance, whether secured or unsecured, on the application of the person in whose favour or of the person against whom the order was made, or, in respect of secured maintenance, of the legal personal representatives of the latter, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.

[17] Section 96 LRA reads:

> Power for court to vary orders for custody or maintenance
>
> 96. The court may at any time and from time to time vary, or may rescind, any order for the custody or maintenance of a child on the application of any interested person, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.

[18] These are generally in the nature of ancillary reliefs applied for after a divorce petition has been filed in a matrimonial proceeding under the Divorce and Matrimonial Proceedings Rules 1980 ("DMPR"). I do appreciate the fact that the LRA is a social piece of legislation and that interim reliefs for maintenance for wife and even maintenance of children may be made even before the filing of a divorce petition. See the case of *Diana Clarice Chan Chiing Hwa v. Tiong Chiong Hoo* [2002] 1 CLJ 721; [2002] 2 MLJ 97. However, these are generally of an interim nature pending the hearing of a divorce petition when the same is filed.

[19] The OS applied for is not an application for an ancillary relief; being an application filed even before the filing of a divorce petition. It is an application for an interim relief; interim pending the filing and hearing of the divorce petition. As was observed by Yeoh Wee Siam JC (as she was then) in *Chung Fui Chu v. Foo Ho Cheng & Another Case* [2010] 10 CLJ 93 at p. 103:

> Temporariness of the Interim Order
>
> [36] An interim order is only intended to be an order for the interim period, namely, from the time the divorce petition is filed until the time when the court grants the divorce. It is therefore a temporary order to ensure that the petitioner, as a wife, gets some reasonable amount of maintenance until the time when the court grants a final order on maintenance at the time of granting the divorce.

[20] Though spoken in the context of an interim order with respect to maintenance filed after a divorce petition has been filed, a *fortiori* the same principle would also apply to an interim custody order applied for before a divorce petition is filed.

[21] In like vein in the Singapore context Judith Prakash J in *Wong Ser Wan v. Ng Cheong Ling* [2005] SGHC 218 opined as follows:

> 80. The consent maintenance order was made under Part VIII of the Act which contains the provisions dealing with the maintenance of wives and children during the subsistence of the marriage. Now that the parties are divorced, the appropriate section in relation to maintenance of the wife is s. 113 of the Act which gives the court power to order a man to pay maintenance to his former wife when granting or subsequent to the grant of the divorce decree. The factors that the court must take into account when determining the amount of any maintenance to be paid are set out in s. 114 of the Act. Among these are the income, earning capacity, property and other financial resources which the parties have or are likely to have in the foreseeable future and the financial needs, obligations and responsibilities which they have or are likely to have in the foreseeable future. As I see the position, I must now exercise my powers in relation to maintenance under this section and, in doing so, I am not bound by the consent maintenance order. I make this observation because the wife had submitted that under s. 117 of the Act, the consent maintenance

> order would persist until the death of the wife or the husband, whichever is the earlier, or until the remarriage of the wife. In my judgment, *that section only applies to maintenance orders made pursuant to s. 113 and not to orders, like the consent maintenance order, made pursuant to Part VIII of the Act which have to be reconsidered or affirmed if the parties subsequently divorce.* (emphasis added)

[22] Though the above was in the Singapore context of maintenance for the wife, the same should apply in our context with equal force in the case of maintenance for the children applied for under s. 93(1)(a) LRA which reads:

> The court may at any time order a man to pay maintenance for the benefit of his child:
>
> (a) if he has refused or neglected reasonably to provide for the child;

as opposed to one applied for under s. 93(1)(c) LRA which reads:

> (c) during the pendency of any matrimonial proceedings;

or for that matter that one made under s. 93(1)(d) LRA which reads:

> (d) when making or subsequent to the making of an order placing the child in the custody of any other person.

[23] Whilst s. 93(1)(a) would apply even to a case before the filing of a divorce petition, s. 93(1)(c) and (d) would generally apply after a divorce petition is filed.

[24] The court will look at the application for custody, access and maintenance afresh in a divorce proceeding and may vary, affirm or rescind it, bearing in mind always what had been ordered or agreed by consent and having always in the forefront of its mind the reasonableness of the desires of the parties and the welfare of the child.

[25] The vast powers of the court always to act in the interest of the child can be seen even in its ability to vary the agreement between the husband and wife relating to custody and maintenance of the child where it is satisfied that it is reasonable and for the welfare of the child. Section 97 LRA provides as follows:

> S 97 Power for court to vary agreement for custody or maintenance
>
> 97. **The court may at any time and from time to time vary the terms of any agreement relating to the custody or maintenance of a child**, whether made before or after the appointed date, notwithstanding any provision to the contrary in any such agreement, **where it is satisfied that it is reasonable and for the welfare of the child so to do**. (emphasis added)

[26] The welfare of the child being of paramount importance, no fetters should be placed on the court's powers to make an order that would best promote the welfare of the child. Whilst the court would have always in mind the terms of any consent order entered into by the husband and wife, that consent order or for that matter, an order made after analysing the

affidavits and hearing submissions of counsel, cannot be cast in concrete and changing circumstances may operate to constrain the court to tweak and tailor its previous order always with the child's welfare at the heart of its concern.

[27] There is also no merits whatsoever in the husband's submission that as there was no consent order recorded on maintenance for the children, the wife then cannot claim for maintenance for the children in the divorce petition. Indeed learned counsel for the husband, Mr Sheelan Arjunan, sought to take the argument further by stating that by the consent order recorded in the Shah Alam High Court in the OS, the petitioner wife had agreed that no maintenance be provided for the children. A closer and careful examination of the consent order would reveal that nowhere is it recorded that the wife had agreed not to claim any maintenance for the children. All that one can say of the consent order is that it is not recorded the provision of maintenance for the children; a whole world of difference from saying that the wife had agreed not to claim maintenance for the children.

[28] Indeed no parties may oust the jurisdiction and power of the court to decide on matters of custody, access and maintenance as these are matters conferred by Parliament on the courts to decide under the LRA and any agreement of the parties with or without a consent order cannot prevent the court, on an application of a party or at the hearing of the divorce petition, from looking afresh at the issue and see if what has been agreed or recorded in an order, consented to or otherwise, is still consistent with and promoting the best interest of the child, having regard to changing circumstances of the case.

[29] As was observed by His Lordship Raja Azlan Shah Acting LP (as his Royal Highness then was) in *Mahabir Prasad v. Pushpa Mahabir Prasad* [1981] CLJ 124A; [1981] CLJ (Rep) 65; [1981] 2 MLJ 326 at p. 67 (CLJ); p. 327 (MLJ):

> We are of the opinion that the learned judge was also wrong in law in coming to the conclusion that on the merits the father could not succeed. He said that if at all there was any allegation of change in the circumstances, it was only an allegation that the infants had expressed their strong decision to remain in Malaysia under the father's custody, an allegation to which he attached little importance. *Change of circumstances, in our view, may be brought into the picture to reverse a previous decision of the same court, even though differently constituted. In such a case the matter is never res judicata. A custody order is not final and conclusive. If any change has taken place in the circumstances of the parties which warrants a reconsideration of the matter, the court is not bound by a former order, but, will use its discretion with respect to the altered conditions, always bearing in mind the fact that the welfare and happiness of the infants are the paramount considerations*. (emphasis added)

[30] That has been the practice with respect to matrimonial proceedings in the UK courts. Lord Denning LJ in the English Court of Appeal case of *Thompson v. Thompson* [1957] 1 All ER 161 at p. 165 gave the rationale for such a practice as follows:

> The first ground of the application is estoppels by *res judicata*. The husband says that the wife's allegations of cruelty were all fought out in the maintenance proceedings; and that she is stopped from raising them again now. There is no doubt, in my mind, that, if the doctrine of *res judicata* applies in its full force to the Divorce Division of the High Court, the wife is so estopped. The issue of cruelty has already been the subject of litigation by a court of competent jurisdiction, *to wit*, the court which tried the wife's claim for maintenance, and the court would not, according to the ordinary principles, permit her to open the same subject of litigation again: see *Hoystead v. Taxation Comr.* (1) ([1926] AC 155 at p. 170). The question in this case is, however, whether those ordinary principles do apply to the Divorce Division. The answer is, I think, they do apply, *but subject to the important statutory duty of the Divorce Court to inquire into the truth of a petition - and of any counter-charge-which is properly before it, and no doctrine of estoppels by res judicata can abrogate that duty of the court ...*
>
> The full proposition is that, once an issue of a matrimonial offence has been litigated between the parties and decided by a competent court, neither party can claim as of right to reopen the issue and litigate it all over again if the other party objects (that is what is meant by saying that estoppels bind the parties): but the Divorce Court has the right, and indeed the duty in a proper case, to re-open the issue, or to allow either party to re-open it, despite the objection of the other party (that is what is meant by saying that the estoppels do not bind the court). Whether the Divorce Court should re-open the issue depend on the circumstances. If the court is satisfied that there has already been a full and proper inquiry in the previous litigation, it will often hold that it is not necessary to hold another inquiry all over again. But if the court is not so satisfied, it has a right and duty to inquire into it afresh. If the court does decide to re-open the matter, then there is no longer any estoppels on their party. Each can go into the matter afresh. (emphasis added)

[31] The same rationale is captured in the *dicta* of Sir Stanley Rees in *Rowe v. Rowe* [1979] 2 All ER 1123 at p 1131 in the UK Court of Appeal as follows:

> There are plainly a number of areas in matrimonial law in which the doctrine of estoppel has been eroded or excluded. Thus, in *Porter v. Porter* it was held that although the estoppel operated to prevent a party in ancillary proceedings from challenging the ground on which a decree was granted or any express finding of fact, it was permissible to adduce evidence of other grounds of complaint pleaded.
>
> **No doctrine of estoppel per *rem judicatam* can abrogate the statutory duty of the court to enquire into the truth of a petition** (see *Thompson v. Thompson*). Nor can a party be estopped from contending that his marriage is void (see *Hayward v. Hayward*). Counsel for the Official Solicitor

commented aptly 'otherwise you could have marriage by estoppel. **'There are impressive *dicta* to the effect that the principle of *res judicata* may not apply at all in relation to custody proceedings**. For example, in *F v. F* ([1968] 2 All ER 946 at 950, [1968] 1 WLR 1221 at 1229) Salmon LJ said: 'I doubt whether the principles of public policy on which the doctrine of *res judicata* is founded, have any real application in custody proceedings.' (emphasis added)

[32] Therefore, the consent order in the previous OS filed before this divorce petition may be looked at afresh by this court and varied if necessary, bearing in mind always what would best promote the interest and welfare of the children.

Whether The Petitioner Wife Has Discharged The Burden Of Proving The Needs Of The Children

[33] The respondent husband's counsel contended that the petitioner wife has not proved on the balance of probabilities the needs of the children with respect to the expenses of the children. His focus was on the expenses of the children for 2014. His contention was that there were no documents shown to support the wife's claim for maintenance of at least RM500 per month for each of the three children.

[34] To be fair to the wife, she has given a detailed breakdown of the expenses of the children for 2013 at pp. 68-69 of the BOD. I have no good reason to doubt these expenses though she might not have a complete dossier of supporting documents for each and every item but I must say that most of the items are supported with receipts. The breakdown of the monthly expenses for the children would come to RM5,515.19. The items included car instalments, insurance, taekwondo fees, electricity bills, water bills, Astro bills, Telekom bills, Maxis bills, Indah Water bills, petrol, toll, parking, marketing, groceries, entertainment in terms of food at restaurants, food at work, daily school pocket money, bus fare to school, medical, maid and other expenses. As for breakdown of the kindergarten fees for the two younger children they are detailed at pp. 69 of the BOD and they amounted to RM8,266 per year for 2013.

[35] As the trial was on 16 January 2015, the wife might be pardoned for not been able to completely compile the children's expenses for 2014. However, as explained by her in her answer to question 18 of her witness statement, if at all most of the expenses have increased. According to her bus fare has increased by double from RM110 to RM220. Pocket money has also increased by RM40 per month.

[36] Learned counsel for the husband went on to even submit that as the documents supporting the expenses of the children for 2014 have not been exhibited, then an adverse inference ought to be drawn against her based on s. 114(g) Evidence Act 1950. A judge is perfectly entitled to take judicial cognisance if not judicial notice of the fact of the high costs of living in the

Klang Valley and what not with the then impending implementation of the goods and services tax (GST) and to draw on his personal experience of bringing up children and the experience that costs of education, food, clothing, utilities and transport have all been on the rise. Suffice to say that children do not survive alone on love, fresh air and sunshine; there is the mounting costs of living that all parents have to manage and the need to make the necessary sacrifice for the sake of the children.

[37] Indeed in matters of maintenance especially in matrimonial proceedings, the courts have tended to take a more inquisitorial and investigative approach. I can think of no better authority to cite then the *dicta* of Lord Sumption in the decision of the UK Supreme Court in *Prest (Appellant) v. Petrodel Resources Limited and others (Respondents)* [2013] UKSC 34 where it was observed as follows:

> 45. The modification to which I have referred concerns the drawing of adverse inferences in claims for ancillary financial relief in matrimonial proceedings, which have some important distinctive features. *There is a public interest in the proper maintenance of the wife by her former husband, especially (but not only) where the interests of the children are engaged.* Partly for that reason, the proceedings although in form adversarial have a substantial inquisitorial element. The family finances will commonly have been the responsibility of the husband, so that although technically a claimant, the wife is in reality dependent on the disclosure and evidence of the husband to ascertain the extent of her proper claim. *The concept of the burden of proof, which has always been one of the main factors inhibiting the drawing of adverse inferences from the absence of evidence or disclosure, cannot be applied in the same way to proceedings of this kind as it is in ordinary civil litigation.* These considerations are not a licence to engage in pure speculation. *But judges exercising family jurisdiction are entitled to draw on their experience and to take notice of the inherent probabilities when deciding what an uncommunicative husband is likely to be concealing*. I refer to the husband because the husband is usually the economically dominant party, but of course the same applies to the economically dominant spouse whoever it is. (emphasis added)

[38] Lady Hale concurred with the inquisitorial approach taken by Lord Sumption in *Prest (Appellant) v. Petrodel Resources Limited and others (Respondents) (supra)* as follows:

> 85. … *There is a public interest in spouses making proper provision for one another, both during and after their marriage, in particular when there are children to be cared for and educated,* but also for all the other reasons explored in cases such as *Miller v. Miller* [2006] UKHL 24, [2006] 2 AC 618. *This means that the court's role is an inquisitorial one.* It also means that the parties have a duty, not only to one another but also to the court, to make full and frank disclosure of all the material facts which are relevant to the exercise of the court's powers, including of course their resources : see *Livesey (formerly Jenkins) v. Jenkins* [1985] AC 424. If they do not do so, the court is entitled to draw such inferences as can properly be drawn from all the

A available material, including what has been disclosed, judicial experience of what is likely to be being concealed and the inherent probabilities, in deciding what the facts are. (emphasis added)

[39] Such an approach is especially relevant to our family law jurisprudence bearing in mind s. 47 of the LRA where it is provided as B follows:

Subject to the provisions contained in this Part, the court shall in all suits and proceedings hereunder act and **give relief on principles** which in the opinion of the court are, as nearly as may be, **conformable to the principles on which the High Court of Justice in England acts and gives** C **relief in matrimonial proceedings**. (emphasis added)

[40] This approach finds support in r. 67 of the Divorce and Matrimonial Proceedings Rules 1980 as follows:

67. Application heard by judge

D (1) In the case of an **application for financial or other relief which is being heard at the same time, the registrar shall**, after completing his **investigation** under Rule 65, **report the result thereof in writing to a judge** to whom the application shall be adjourned.

(2) The registrar's report shall contain an estimate of the financial relief E to which, in his opinion, the applicant is entitled (if he has not already obtained an order for financial relief) and of the relief to which, in the registrar's opinion, the applicant would be entitled if the application were granted.

(3) The registrar's report shall be filed and any party shall be entitled to inspect the report and to be supplied with a copy on payment of the F prescribed fee.

(4) On the hearing of the application, the judge may confirm or vary the registrar's report or make such other order as he thinks just.

(5) Where the parties come to an agreement as to the terms of the order to be made on the application, an order in those terms may be made by G the registrar and paragraphs (1) to (4) shall not apply. (emphasis added)

[41] A judge hearing a divorce petition where oral evidence is given in support of the wife's claim for maintenance of the children is entitled to follow the same investigative approach in determining what is a reasonable maintenance for the children. The state cannot suffer the children to languish H or be deprived and worse still, being destitute just because the parents are going separate ways in a divorce.

[42] In this case, there is sufficient documentary evidence for 2013 to support the expenses of the children on a balance of probabilities such that I one can safely conclude that the expenses for 2014 can only increase with increased consumption of everything consistent with the children being older by a year and the ever rising costs of living. Taking a more inquisitorial and investigative approach as supported by the practice in England and the

scheme and structure of the Divorce and Matrimonial Proceedings Rules 1980, I have no hesitation in accepting the evidence of the petitioner wife on the needs of the children as borne out by what she had spent on the children in 2013.

What Is A Reasonable Maintenance For The Three Children That The Husband Has To Pay

[43] The duty of a parent to maintain his or her children is statutorily provided for in s. 92 LRA as follows:

> Duty to maintain children
>
> 92. Except where an agreement or order of court otherwise provides, it shall be **the duty of a parent to maintain or contribute to the maintenance of his or her children**, whether they are in his or her custody or the custody of any other person, either by providing them with such **accommodation, clothing, food and education as may be reasonable** having **regard to his or her means and station in life** or by paying the cost thereof. (emphasis added)

[44] The husband has a primary duty to maintain his children as contained in s. 93 LRA as follows:

> Power for court to order maintenance for children
>
> 93. (1) The court may at any time order a man to pay maintenance for the benefit of his child ...

[45] The wife's duty to maintain her children is only secondary; supportive and supplementary to that of the husband as can be seen in s. 93(2) LRA as follows:

> (2) The court shall have the corresponding power to order a woman to pay or contribute towards the maintenance of her child where it is satisfied that having regard to her means it is reasonable so to order.

[46] It is not seriously disputed that the husband has not been providing maintenance for the children since the separation between them in July 2010. The husband however asserted that he contributed RM300 as insurance and education coverage under an insurance policy for the children. The wife on the other hand has been bearing all the expenses of the children as enumerated at pp. 68-69 of the BOD. She has been candid in disclosing her salary advice from her employer Viru, Goona & Associates where she worked as a senior auditor. Her gross salary is RM4,300 per month and her net earnings after deducting EPF, SOCSO and tax is RM3,666.25.

[47] The husband works as a recovery officer for CCR Networks Sdn Bhd with a gross salary of RM2,153.95 per month as reflected in his company's payment advice for the month of December 2014, attached to his supplemental witness statement. His nett pay was RM1,941.70. He admitted that with the increment of RM300 for 2015 his average take home pay would

be between RM2,300 to RM2,400 taking into consideration the commission he would receive for successful recovery from debtors of the clients. However, he has not produced any documents showing his average commission that he has been accustomed to take home based on the success of his recovery efforts.

[48] I agree with learned counsel for the wife, Mr Periasamy, that having graduated at 23 years old with a degree in Electronic Design System, and now at 37 years old, his take home pay is dismally disproportionate to his qualification and years of experience. He used to earn extra income as a part-time photographer but now testifies in court that he had disposed of his camera and that there are no other sources of income.

[49] He said that his expenses are as follows:

(i)	car	RM500
(ii)	medical education plan for children	RM300
(iii)	personal expenses	RM300
(iv)	expenses for house of parents	RM500
(v)	petrol	RM300

[50] He painted a pathetic picture of an average monthly expenses of RM1,800 per month.

[51] The husband has to appreciate that as a primary provider for the children he ought to be more resourceful and enterprising. His earning capacity and potential has to be taken into account in determining his contribution towards maintaining the children. It is not uncommon for many working in the Klang Valley to take on another part time job to supplement the income from one's full time job especially for a husband with growing children and correspondingly growing financial needs. He has not given any good reasons why he has not wanted to continue with his part-time photography business; an innovative means of converting one's hobby into an additional source of income. We need only to look around at how others provide for the family by in some instances driving a taxi at night, giving tuition to students, setting up a car wash business, doing electronic and electrical repair jobs and the like. No task is too menial and below one's dignity and if need be, the husband would have to eat humble pie to provide for the children. In *Lee Yu Lan v. Lim Thain Chye* [1983] 1 LNS 41; [1984] 1 MLJ 56 at p. 58 Peh Swee Chin J (as he then was) made the point that:

> ... even an unemployed husband could be legally ordered to pay a nominal sum, for his spouse or ex-spouse, and his children.

[52] Like all things that come with sacrifice, he would have to cut down on his expenses. He might well have to ask his younger brother to contribute more towards the household expenses for their parents. The husband has not

given any information on his brother's salary and his capacity to contribute towards their parents' household expenses. It is not uncommon to call upon one's brother or sister to help out with the family's expenses when one is in financial straits.

[53] Granted one must cut one's clothes according to one's size and that one must take a cold hard look at one's means and station in life but I am not able to say that the expenses as enumerated by the wife has been excessive or extravagant in any way. The husband said that he could not take on other jobs because he wanted to concentrate on his current job. If that be the case then his commission should see an increase consistent with a more effective recovery that comes with greater focus and fortitude.

[54] For the sake of one's children, one must be prepared to work hard and to work long hours and even to take up more than one job so that one may more ably provide for the children. What would distinguish a graduate from a non-graduate would be the graduate's resourcefulness, innovativeness and both the potential and capacity to be more productive in one's endeavour to provide for one's children. All that has to be harnessed to the fullest in providing for one's children.

[55] Taking into consideration the wife's higher income, the growing needs of the children and the current and potential earning capacity of husband, a sum of RM1,000 per month for maintenance for the three growing children would be more acceptable compared to the ridiculously paltry sum of RM300 per month for all the three children. Even with this contribution it would be the wife who has to bear the bigger brunt and burden of providing for the children.

Whether The Husband Should Be Allowed Overnight Access In The Circumstances Of The Case

[56] The interim order of the Shah Alam High Court in the OS provided that custody, care and control of the three children shall be with the petitioner wife and that the respondent husband shall have access to the children every Saturday 4pm to 6pm on Sunday. He is not challenging the fact that the custody of the children should be with the wife. However, he objected to the wife praying for the access to him to be reduced to alternate Saturday from 2pm to 6pm.

[57] There is no doubt that children must be allowed to spend quality time with both the parents and the matter assumes heightened importance when the parents have gone separate ways in a pending divorce proceeding that would culminate with an order for dissolution of the marriage. Reasonable access is the norm where the other parent has custody of the children. It must not be forgotten that "access is the basic right of the child rather than the parent" as was highlighted by Her Ladyship Zainun Ali J (now FCJ) in *Leong Sam Moy v. Low Chee Thiam* [1997] 2 CLJ Supp 212 at p. 214 as follows:

A The law as it stands on this authority cited before me says that "access is the basic right of the child rather than the parent."

The Court must consider, whether the welfare of the children is prompted by access or the reverse and decide accordingly"

B **[58]** Where there is love between the married couple, there is no law to specify how much time the children should be with the couple. More often than not, when love has disappeared between the couple, the law is not enough to specify how much time the children should be with the parents that are no longer staying together. Indeed where there is love, there is no need for the law to dictate the actions of the couple *vis-a-vis* their children but C where there is no love, the law often is inadequate to specify and stipulate the time that the children should be with each of the parent. More time given by the court to the wife to be with the children would be perceived by the husband to be invariably less time that he could be with the children. Compounding the problem is the fact that both the husband and wife are D working in the day to support the family; one the bread winner and the other the jam winner! The reality of many a middle-class family in the Klang Valley is that both parents have to work to make ends meet amidst escalating costs. The challenge then is how to find quality time when quantity time for the parents to be with the children are limited and more so when they are E separated and finally divorced from each other. Ultimately it is the children then that would lose out and more so when we perceive the palpable stress and tension they are put through when they are being interviewed by the judge in trying to ascertain their preference where custody or as in this case, access is concerned. The court has to perform the delicate task of balancing a multitude of factors to ensure that the children would grow up secure in F the love of both their father and mother. The best solutions are those where the adults can agree with respect to custody and access for then they can explain to their children the reasons for the decision and generally children will learn to adjust to the inevitability of their parents going separate ways in a divorce. In cases where the parents 'fight' over them, it is not uncommon G to see the ugly side of one parent using them as pawns to lobby for more favourable terms of maintenance or access as the case may be. Whilst it can be appreciated that there should be least disruption in the current arrangement where access for the husband is concerned, the court in appraising afresh the situation in a divorce hearing, would have to look at H how the welfare of the children may best be promoted and enhanced. As was reiterated by the Federal Court in *Mahabir Prasad v. Pushpa Mahabir Prasad* [1981] CLJ 124A; [1981] CLJ (Rep) 65; [1982] 1 MLJ 189, "the first and paramount consideration" must always be the welfare of the children. The Federal Court cited with approval Lord Mac Dermott's exposition as to what I is meant by the phrase "first and paramount consideration" in *J v. C* [1970] 2 AC 668, 710-711, stating that:

> It connotes a process whereby, *when all the relevant facts, relationships, claims and wishes of the parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the children's welfare* as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed. (emphasis added)

[59] It must be borne in mind that the interim order was given more than three years ago when the eldest was five, the middle was four and the youngest just two. It can be appreciated as argued by the wife, that as the children are now eight, seven and five respectively and they are going to school with the youngest going to kindergarten, they now have more homework and extra-curricular activities to attend to. The court would also consider the undesirability of splitting the children where overnight access is concerned even though the eldest has expressed a preference for overnight stay with the father. I would also take into consideration the fact that the children are quite tired after the overnight weekends with the father leaving them less than prepared for the challenges of the week ahead starting Monday.

[60] As the wife is also working and in fact having to work harder and longer hours to bring in the extra income with the additional accounting jobs that she could do at home for some friends, there is also the need for the wife to have some time relaxing with the children. There is always the need to ensure that the mother, having to work during the day and to rush home to cook for the children and to help them with their homework as well as to put them to bed during the weekdays would be all tired and exhausted by the end of each day. There is a need for the wife as a mother to have times of refreshing with the children on a weekend. Otherwise, her love would be perceived by the children to be all tough love where it is school and homework and tuition and housework and a husband's weekend overnight access would be all fun and play and outing and shopping!

[61] I also would take into consideration that the husband would need some of the weekends for extra work whether it be in going back to his photography which hobby he had managed to monetise at one stage or some other endeavours that would be income generating so that he may be in a better position to provide for the children.

[62] It is with the above considerations in mind that I have the difficult decision to reduce for the husband his access to the children to every alternate Saturday from 3pm to 8pm and on every Sunday from 9am to 5pm. This would ensure that he gets to spend time with the children every week and at the same time the mother would be able to spend quality playtime with the children on alternate Saturday bearing in mind that there are tuitions and taekwondo classes for the children on Saturday morning as well. Perhaps

when the children are bigger, overnight access on alternate Saturday may resume. That sort of arrangement where access is concerned would better promote and enhance the welfare of the children where bonding through playtime is concerned and where the children's studies are least disrupted and their readiness for school on Monday is more assured.

Pronouncement

[63] At the end of the trial, the court had granted a dissolution of the marriage and that the decree *nisi* be made absolute immediately. I also ordered that the husband pay maintenance of RM1,000 per month for the three children into the CIMB account provided by the wife by the seventh day of each month. The access given to the husband in the interim consent order is reduced to the husband having access to the children on every alternate Saturday from 3pm to 8pm and on every Sunday from 9am to 5pm. Being a matrimonial matter, I made no order as to costs.

Postscript

[64] As can be seen the dispute where maintenance was concerned was just over a mere RM1,000 per month which the court finally ordered the husband to pay for the maintenance of the children. It would be fair to say that most orders for maintenance, even if it be a lump sum maintenance, would rarely reach the monetary jurisdiction of the High Court in an ordinary civil claim. Granted that the Sessions Court now has unlimited jurisdiction in negligence claims in running-down matters as well as in distress matters and seeing that they too now have jurisdiction in even granting injunctive orders as well as declaratory reliefs, perhaps the time is now both right and ripe for the Sessions Court to be conferred with unlimited jurisdiction in all matrimonial matters in as much as they have been hearing adoption matters all this while. As the Sessions Court now has jurisdiction to even grant specific performance reliefs in land matters, it would not be too much an adjustment to adapt to when it comes to division of matrimonial assets.

[65] Perhaps the legislators have this mind when they provide in s. 2(2) LRA the following:

> The Yang di-Pertuan Agong may, on the advice of the Chief Justice, by notification in the Gazette, confer upon any President of the Sessions Court jurisdiction to deal with any matter under this Act.